

1 it, but I'd like just to refer you to page 13 of the asset
2 purchase agreement. It's paragraph -- subparagraph E which
3 talks about that So then you have to look at the
4 transmission services agreement to see what else is
5 happening with respect to that equipment. Well, it turns
6 out that they're supposed to insure that equipment, and this
7 is at paragraph 2(e) of the transmission services agreement,
8 and they're supposed to name RCN -- or Freedom as the last
9 payee on the insurance policy. In other words, if the
10 equipment is blown out by lightening or something, the
11 insurance company doesn't pay Bartholdi. It pays RCN -- or
12 I'm sorry, Freedom.

13 Bartholdi agrees in the transmission services
14 agreement at subparagraph M not to sell or assign or
15 encumber the retained equipment, not to put a lien on it.
16 Now, what I submit to you, sir, is that if you can't sell
17 something and you buy an insurance policy that pays somebody
18 else if that something is blown up, and you agree at the
19 will of somebody else to transfer ownership or title to that
20 something without receiving any money, then you don't own
21 it. You don't own it because the bundle of property rights
22 that consists of ownership, every one of them you've given
23 up to someone else.

24 Now, I understand that ownership alone is not
25 determinative of change of control. But having said that,

1 it clearly is a major factor that one should look at in
2 trying to figure out whether change of control has taken
3 place.

4 The second thing I want to point to in the
5 transmit is what use Liberty Bartholdi may make of these
6 licenses. Now, what they've told you is that they're now a
7 private microwave carrier, and they deliver the programming
8 to the buildings that are now owned by Freedom New York.
9 That's true. But they do not have any ability to on their
10 own make use of these paths other than to benefit Freedom
11 New York. And this transmission service contract, when you
12 look at it carefully at paragraph 6, you realize that it is
13 a perpetual contract. There is no way should it choose to
14 for Bartholdi to relieve itself of the obligation to carry
15 the programming for Freedom.

16 Paragraph 6 has an initial five year term, and
17 then the customer -- that's Freedom -- has the option to
18 either extend the agreement for successive periods of 180
19 days on 30 days notice or to terminate. There is nothing in
20 here that permits -- that ever permits Bartholdi to say I'm
21 not doing this anymore for you. It goes on forever. And
22 what I would suggest to you, sir, is that given that
23 contractual provision, by contract, Bartholdi has given up
24 the use of control of the use of that license because it is
25 contractually promised to run that microwave path for

1 Freedom forever as long as Freedom wants it.

2 And obviously, Freedom can decide, as the contract
3 says we're not going to renew or we're going to convert the
4 building or whatever. That isn't the point. The point is
5 that Bartholdi never has an opportunity to end the deal and
6 it does not end.

7 The second point that I want to mention to you,
8 and again, this is something that about which we only have
9 partial information, is the asset the purchase agreement
10 refers to a non-competition payment -- and that's on page 8
11 of the asset purchase agreement -- which has been to
12 "certain coventors in accordance with the non-competition
13 agreement" which we don't have here.

14 JUDGE SIPPEL: What page is that on?

15 MR. BECKNER: That's on page 8, sir, of the asset
16 purchase agreement. That's in the definition section.

17 JUDGE SIPPEL: Okay.

18 MR. BECKNER: And there's an additional reference
19 to that fact on page 12 with respect to the payments. I
20 believe it's page 12. I'm sorry, page 11, Section 2.1. It
21 says, "A closing seller shall sell and buyer shall acquire
22 all purchased assets" -- I'm leaving out some stuff -- "In
23 consideration of the payment by buyer to seller of the
24 initial purchase price, that non-competition payment to the
25 coventors (phonetic) as defined in the non-competition

1 agreement", et cetera.

2 Now, the reason I raised that is I don't know who
3 the non-competition covenators (phonetic) are. But I could
4 make a good guess. And the guess that I would make are the
5 Milsteins, the people who own Bartholdi; and that it would
6 be reasonable to assume that Freedom doesn't want the
7 Milsteins going into business and competition with them.
8 But the Milsteins are the ones who own Bartholdi. And what
9 that means is that because they own Bartholdi, they cannot
10 use the licenses or the applications to supply someone else
11 who might want to compete with Freedom New York in the
12 provision of video programming to apartment buildings.

13 In other words, if we have a building at 10 West
14 Sixty-sixth Street, for example, which right now, is run --
15 which is a microwave receive site for Liberty -- it's a
16 building that they serve. And now let's suppose that at
17 some point in the future, somebody else wants to get into
18 the same kind of business that Liberty used to be in and
19 that is providing programming by using a microwave
20 distribution as opposed to cables, Bartholdi cannot by
21 virtue of the non-compete supply a microwave path to a
22 customer who wants to compete with Freedom for 10 West
23 Sixty-sixth, just to use a hypothetical example.

24 And I think that's true by -- I mean, it's true
25 for two reasons. It's true because the transmission

1 services agreement is an exclusive agreement. But even if
2 the -- even if the transmission that Bartholdi was making
3 for Freedom terminated the 10 West Sixty-sixth because
4 Freedom said okay, I've got my own license, Bartholdi could
5 not reestablish a transmission for some other customer to
6 that address I believe because of the non-competition
7 agreement. Again, I don't have the agreement; I don't know
8 who the people are. But I am suggesting to you that they
9 may, in fact, be the case. And the relevance of that has to
10 do with who has control of the use of the licenses.

11 JUDGE SIPPEL: Now, I just want to interrupt for a
12 minute. You've gone way past your time.

13 MR. BECKNER: Okay.

14 JUDGE SIPPEL: Do you want to just say one more
15 sentence --

16 MR. BECKNER: Yes, sir.

17 JUDGE SIPPEL: -- because of something else that
18 might --

19 MR. BECKNER: Yes, sir. One more sentence. The
20 final point that I want to make is that the subcontract
21 agreement for whatever it's worth is in essence a mirror
22 image of the transmission services agreement. In other
23 words, the transmission services agreement -- Bartholdi
24 promises, you know, in warrants that it's going to run the
25 system really well and so on. In the subcontractor

1 agreement, Freedom promises that it's going to run the
2 system really well for Bartholdi. Freedom is Bartholdi's
3 customer. The whole thing is incestuous.

4 Contrary to Mr. Price's affidavit, there are no
5 separate employees hired by -- on a contract basis by
6 Bartholdi to run the system which is what he said in his
7 affidavit in the first opposition. There is a company hired
8 which he didn't tell you. And that company we now know is
9 Freedom.

10 JUDGE SIPPEL: All right. We're going to be a
11 little bit -- I'm going to let everybody have equal time.
12 You're going to get a little bit more because you've got the
13 burden --

14 MR. BECKNER: Thank you.

15 JUDGE SIPPEL: -- but not much. All right, Mr.
16 Webber.

17 MR. WEBBER: Thank you, Your Honor. First I'd
18 like to I guess introduce on the record Howard Davenport.
19 He is chief of the Enforcement Division and he is here today
20 because he was in attendance at the January 25th meeting
21 where Liberty and Freedom, at that time an unnamed party,
22 discussed the transactions which we're discussing today with
23 the Bureau for the first time.

24 JUDGE SIPPEL: Okay. Thank you, sir.

25 MR. WEBBER: And you asked for somebody to be

1 here.

2 JUDGE SIPPEL: Mr. Davenport, good morning.

3 MR. DAVENPORT: Good morning, Judge.

4 MR. WEBBER: The Bureau looks at this as they
5 really gain two main issues: 1) the first being whether
6 there was a legal -- excuse me, a legal transfer occurred.
7 And based upon the review of the documents and the review of
8 the contracts and the Part 94 rules, the Bureau has come to
9 the conclusion that Part 94 does indeed allow the type of
10 situation that was transacted between Liberty and Freedom.
11 And therefore, we don't find that the transfer itself is
12 illegal. However, there is a caveat with that. One of the
13 requirements by Part 94 is that the licensee retain control
14 over the licenses.

15 And that brings us really to what the second issue
16 is, is whether or not there's been any illegal transfer of
17 control. And at this point, the Bureau really doesn't
18 believe there's enough information for us to make a
19 determination. The documents do indeed demonstrate that
20 Liberty has retained legal control of the facilities.
21 However, Commission precedence as well as the U.S. Court of
22 Appeals decision in the Ellis Thompson remand showed that
23 what is really important is actual control, not legal
24 control. And we really have nothing to look at in order to
25 base a decision upon what is actually happening as opposed

1 to what legally can happen.

2 The Bureau really in its pleading has outlined
3 three areas where we have questions. And those deal with
4 the day-to-day operations: who is in charge of that; who is
5 in charge or who is making the policy decisions; and who is
6 making personnel decisions.

7 JUDGE SIPPEL: Let me just -- you've listed the
8 intermountain and you've found in certain areas that you
9 can't -- you don't have sufficient information to determine
10 whether intermountain standards are met, is that right?

11 MR. WEBBER: That is correct, Your Honor.

12 JUDGE SIPPEL: And you -- let me ask you this very
13 quickly -- first -- briefly. First of all, is -- in terms
14 of the Part 94 -- the procedures and the practice at the
15 Bureau with respect to Part 94 transactions, do these
16 situations that come up come to your attention, come to the
17 Bureau's attention with any degree of regularity? In other
18 words, are you looking at things like this to determine
19 whether or not it's okay under control standards and this
20 type of thing?

21 MR. WEBBER: This is actually -- with Part 94,
22 this is the first situation I've been made aware of where
23 this particular type of private carriage agreement has been
24 entered into. Our Gettysburg office is typically the office
25 that -- that would be dealing with this type of situation.

1 And our discussions with them, they also say this is very
2 unusual. And so it's not a common thing to my knowledge for
3 somebody operating an 18 Gigahertz operation to end up
4 leasing that out as a private carrier.

5 JUDGE SIPPET: All right. So there's -- I hear
6 exactly what you're saying. All right. I'm sorry. I
7 didn't mean to operate your flow. Go ahead.

8 MR. WEBBER: Really, at this time, the only
9 information we really have which speaks at all to actual
10 control is just a little bit of information we received from
11 our request for interrogatories. And that's particularly
12 the change of employees, that the bulk of the former Liberty
13 employees now work for -- work within Freedom's control
14 instead of within Liberty's control; particularly that there
15 are no longer any engineers or maintenance people under
16 Liberty's control and, therefore, the people who would be
17 designing, running the systems, et cetera, are not Liberty
18 employees.

19 However, at this time, the Bureau does not believe
20 that just this little fact alone is sufficient to rise to
21 the level of being a material and substantial question of
22 fact. I guess put a different way, if the Bureau received
23 this type of information in a petition to deny as opposed to
24 being raised in a proceeding where it's been raised as a
25 motion to add issues, the Bureau would not take that

1 information and request or write a hearing designation
2 order.

3 Instead, the Bureau would do an investigation
4 under Section 308(B) of the act where we would say that it
5 certainly raises questions; we have eyebrows raised trying
6 to figure out what's going on here. So we would order the
7 carrier to give us more information so we could actually
8 then determine whether or not actual control has indeed
9 stayed with Liberty or whether there is indeed an illegal
10 transfer of control. And at this point without that
11 additional information, we can't make that determination.

12 And Mr Beckner is correct; at this point, we do
13 not actually have to make the determination that control has
14 indeed left Liberty in order for the issue to be added. But
15 we do at least have to say there's a material and
16 substantial question of fact. And that is still a burden to
17 be met. And the Bureau at this point is not confident to
18 say that that threshold has been met. And that is why the
19 Bureau in its pleading requested a delay of a decision here
20 while we could do our own investigation.

21 We do intend upon sending out -- if the issue is
22 not added, upon sending out a Section 308(B) letter where we
23 request additional information from Liberty and from Freedom
24 both. And Mr. Beckner would certainly, or Time Warner would
25 certainly be a party to that, as well. They would be given

1 the opportunity to comment to whatever responses we get from
2 Freedom and Liberty.

3 JUDGE SIPPEL: They would be? Is that -- is that
4 normal practice?

5 MR. WEBBER: We have done that with Section 308(B)
6 proceedings previously. One that comes to mind with the
7 Portland, Maine Cellular proceeding, actually that was a
8 control issue, as well. And at two separate times, we sent
9 the company that is currently operating the system --
10 they're a company called Northeast Cellular -- we sent two
11 different times Section 308(B) letters requesting additional
12 information about who was running the system. And each
13 time, the company -- the company called Portland Cellular
14 was able to comment on the responses to our inquiry. So,
15 indeed, that would be a thing -- an option that we could
16 take.

17 JUDGE SIPPEL: But that would not mean necessarily
18 -- would you have authority to put people on the record; to
19 require documents and to put people on the record?

20 MR. WEBBER: We certainly would have the authority
21 to require documents. I would like to think that the
22 carriers would certainly cooperate with us if we did ask to
23 interview their people, as well. I guess it would be
24 certainly less formal than a deposition. It may not have to
25 be actually taken on the record. But I would -- at this

1 point I would believe that if they decide to not cooperate
2 with us and decline to allow us to interview their employees
3 or their personnel, that alone would be enough for the
4 Bureau then to state there is a material and substantial
5 question of fact, the fact they're not cooperating; they're
6 not letting us get at the facts.

7 JUDGE SIPPET: Well, let me ask Mr. Beckner. How
8 would you -- I've got to ask this to Mr. Webber, too. I
9 know that. But how would you feel about participating in
10 that kind of a situation as opposed to an issue added in
11 going after them with the discovery routine?

12 MR. BECKNER: I'm glad you gave me the chance to
13 respond because that was where I left off on my talk. With
14 due respect to Mr. Webber and the Bureau and to the fact
15 that this apparently has been done before, I don't think
16 it's right. And I've looked at a couple of recent D.C.
17 Circuit decisions that would appear to support that although
18 I'm not going to tell you that the issue has ever been
19 before the courts. And the reason that it's not right is
20 that the application is now not before the Bureau. It is
21 before the presiding Judge.

22 308(B) quite clearly -- and 308(B) goes back all
23 the way to the old Radio Act; I mean, it predates even the
24 Communications Act -- was and has been interpreted by the
25 courts to afford the Commission and the Bureau a way of

1 finding out additional information beyond pursuing the
2 application without having to go to a hearing. They are --
3 a hearing and a 308(B) request are alternative and
4 complementary revenues. I mean, the idea that we would have
5 in effect a side proceeding running on the same track as
6 this proceeding with the Bureau doing 308(B) requests is
7 just -- I don't think it makes much sense and I don't see
8 any authority for it.

9 JUDGE SIPPEL: Well, the thing is -- well, let's -
10 - we'll worry about -- once we find out what the procedure's
11 going to be, we'll worry about the authority on this one.
12 But let me ask you this. If the Bureau feels -- the Bureau
13 feels that there are questions, and serious questions --
14 I'll characterize it for Mr. Webber -- serious questions
15 with respect to control, and these are actual control
16 issues, that they don't have the answers to that they'd like
17 to get the answers to, if the answers came out a certain
18 way, then they would feel strongly -- again, I'm putting
19 words in his mouth -- but they would take a firm position
20 with respect to seeking an issue added because they would
21 have concluded that there is a substantial question of fact
22 with respect to that matter.

23 Now, that's -- as I view it, that's what they're
24 asking for. They're asking for an opportunity to use a --
25 it's not -- it's not a hearing procedure, but there -- to

1 use a Commission procedure to seek to get more information.
2 Liberty would have an interest it would seem to me in
3 cooperating in that kind of a -- in that kind of an
4 arrangement.

5 And if there was a time frame, a lot of it
6 wouldn't have to -- in effect, it would be giving an
7 extension of time to develop more information to one of the
8 parties in the case. That's essentially what I would see it
9 to be. And the only way of going after that information is
10 to add an issue and then go into the discovery phase and all
11 that kind of stuff.

12 MR. PETTIT: Your Honor, may we --

13 JUDGE SIPPEL: Yes, sir. You will. I don't mean
14 to -- believe me Absolutely.

15 MR. PETTIT: I'm now coming into my time and I
16 guess Mr. Weber's time, as well.

17 JUDGE SIPPEL: No, we'll get into --

18 MR. PETTIT: It strikes me as an extremely
19 creative approach. Liberty and Bartholdi would certainly
20 cooperate in any sort of an investigation. And as somebody
21 used to describe the Commission's authority for this, it --
22 it strikes me the Commission does, in fact have authority
23 under 308 and under 403 and other provisions, in fact, to
24 engage in the investigatory activities; to -- and I would
25 say, in fact, there are procedures to -- to compel

1 appearances and that sort of thing.

2 I don't see the authority of the Commission as
3 being a problem in that. And the reason, in fact, that it
4 is appropriate with all due respect to Mr. Beckner is that
5 we are in a situation very much like a petition to deny as
6 Mr. Webber said. That's sort of the procedural posture
7 we're in with the motion to enlarge issues. It is the
8 burden of Time Warner to show a prima facie case. I mean,
9 we certainly think that that has not been done here and I
10 gather that the Bureau agrees with that.

11 It is certainly not Bartholdi's burden to prove
12 the negative, to show the absence of a substantial material
13 question of fact. That having been said, if the Bureau has
14 questions, it certainly may pursue them. And as I say,
15 Liberty would certainly comply with that.

16 MR. KIRKLAND: Your Honor, with your sufferance,
17 if I could be heard just to amplify a point maybe by Mr.
18 Beckner.

19 JUDGE SIPPEL: Sure.

20 MR. KIRKLAND: In terms of the legality of this
21 proceeding, I think it's not creative. It's extraordinary,
22 Your Honor, because what you would then have -- right now
23 the Bureau is a party to this proceeding. Once a hearing
24 designation order has been issued, the Bureau becomes a
25 party. And that procedure was established in order to

1 preserve the integrity and decision making. What Mr. Webber
2 is proposing is that the Bureau reassume a role as a
3 decision maker in this proceeding in connection with the
4 308(B) investigation.

5 And to have the Bureau acting as both the decision
6 maker and a party in this proceeding I would submit raises
7 procedural complexities that will boggle everyone's mind. I
8 think it also puts extraordinary pressure on the kinds of
9 procedural protections that the Commission has adopted to
10 avoid precisely this kind of problem. So Cable Vision feels
11 quite strongly that that remedy is not only, as I said,
12 extraordinary, but probably illegal and inconsistent with
13 the procedural framework the Commission has adopted.

14 MR. PETTIT: Your Honor, if I may, that I think is
15 legally preposterous. The Bureau is a party to the
16 proceeding. Mr. Webber may write me a letter this afternoon
17 asking me whatever information he wants to and I may respond
18 to that. And he may use the information in forming the
19 Bureau's opinion. There is absolutely nothing that has to
20 do with his status as a party or the Bureau's status as a
21 party to prevent him from doing that. It is perfectly
22 proper. And that is in substance what he's asking to do.

23 MR. BECKNER: The question is, Bob, could I write
24 you the same letter? Could I -- could I demand --

25 MR. PETTIT: I might not write you back, Bruce,

1 but you may. Of course, Mr. Webber is talking --

2 JUDGE SIPPEL: Let's not get this carried too far
3 afield. Ms. Kiddoo.

4 MS. KIDDOO: Just one point, and that is that I
5 think that Mr. -- that what I think that Cable Vision's
6 counsel is missing here is that this issue isn't designated.
7 And as the Bureau has said, after review of the agreements,
8 there has been no meeting of the burden of proof to get it
9 designated into this proceeding. Therefore, the Bureau,
10 since it does have questions, has the statutory right to
11 investigate what it wants to do with respect -- what it
12 wants to investigate with respect to an application. And
13 that's what he is proposing to do here.

14 But you can't lose sight of the fact that nobody
15 has met the burden of a material and substantial issue of
16 fact that needs -- that rises to the level of warranting an
17 enlargement of this proceeding.

18 JUDGE SIPPEL: Well, that's what I'm trying to --
19 that's what I'm trying to resolve.

20 MR. PETTIT: Your Honor, it is certainly far
21 preferable I think from our perspective -- we're certainly
22 not asking for an investigation here. But it is certainly
23 preferable to designating an issue and, you know, starting
24 everybody's meter in this room running with the cost and the
25 delay, that depositions and discovery will entail for

1 possibly, and we would certainly say, no reason at all.

2 JUDGE SIPPEL: Well, I'm acknowledging the fact --
3 I mean, I'm aware both from my own experience and what I'm
4 seeing here that control issues are extremely fact
5 intensive. And you know, once we go down that road, it's --
6 it could become a long and painful road. Just a minute, Mr.
7 Beckner. And with respect to what Mr. Kirkland said, I
8 mean, I know that there's a serious legal issue of the
9 running parallel procedures. I think it was the old Parrot
10 case here in the District. I mean, you don't -- you can't -
11 - you can't run parallel proceedings and use an
12 administrative procedure to feed an ongoing criminal
13 investigation. And that's not what we're talking about.

14 This is just a -- it's another tool -- I look upon
15 it as basically being another discovery tool if it were done
16 in the context that Mr. Webber has outlined it; that is that
17 Time Warner would have an opportunity to comment on it and
18 it would come to my attention. I believe I'm -- I'm
19 assuming that you mean that it would be completed before the
20 record is closed in this case and that I would be told, you
21 know, where the Bureau has come out on their inquiry, or, of
22 course, it might be that well, yes, you guys have been in
23 cooperation but you haven't had time, something like that.
24 But I'm saying that that's the scenario I think that you're
25 contemplating, isn't it?

1 MR. WEBBER: That is correct, Your Honor. It
2 could potentially reach beyond that. I mean, we'll
3 certainly keep you informed obviously if we find more
4 serious problems and we come to a level where we believe
5 there is material and substantial question of fact. We may
6 desire it to go beyond the 18 licenses at question here and
7 decide it necessitates replication proceedings. But that
8 would be apart from this, as well. But I'm kind of jumping
9 the gun there. If -- if you mean by the close of record by
10 August 12th when --

11 JUDGE SIPPEL: No.

12 MR. WEBBER: Oh.

13 JUDGE SIPPEL: I mean by the time that this -- by
14 the time that I would be completing writing what it is that
15 you're going to submit to me in the summary decision form
16 assuming that I were to grant summary decision. If I turn
17 down summary decision, of course, then we're back in here
18 again anyway.

19 MR. WEBBER: That is correct, Your Honor. I mean,
20 I -- I would even hope that we could be done by August 12th.
21 There's no guarantee. I mean, we expect to move quickly on
22 this if indeed this is the path we will be taking. And we
23 would certainly keep you informed and endeavor to have a
24 decision to you or have our findings to you prior to the
25 close of the record.

1 JUDGE SIPPEL: All right. Well, let me just keep
2 this open for the time being because, you know, what you
3 wrote in your last pleading which is what I'm most
4 interested in hearing, that is, the questions that you have,
5 but these are questions that are not substantial questions,
6 this really getting down to almost a metaphysical nicety. I
7 think what was written by the Court in Citizens for Jazz is
8 what I was thinking of when I read that. And that is that
9 the Court in that case said that the statute in effect says
10 that the Commission must look into the possible existence of
11 a fire only when it is shown a good deal of smoke.

12 And the series, the litney of questions that you
13 raised, it certainly in my judgement anyway would constitute
14 smoke. It's a question of whether -- how much smoke is it.
15 You're saying it's not quite enough smoke. And of course,
16 Time Warner is going to say well, it really isn't smoke.
17 That's mist or something else. And the standard, it gets to
18 be really slippery when you come this close to it.

19 MR. PETTIT: I'd say it's more like two lawyers
20 rubbing sticks together.

21 JUDGE SIPPEL: All right. Well, you know, I've
22 read the papers and you certainly have made your point
23 clear, Mr. Pettit, in terms of how you view these documents
24 as being clearly the answer to the question that I'm
25 hearing. However, I'm hearing different things from the

1 other side of the table in different ways. And that's why
2 we're here. That's why I'm trying to get to the bottom of
3 it because I don't want to send you down that road.

4 I don't want to put this case in that posture
5 where we're simply just trying to backfill what the
6 documents clearly show. So let me -- let me -- Mr. Webber,
7 I've kind of cut off into your time, but I think -- have I
8 basically paraphrased what it is that the Bureau's position
9 is in regards to this?

10 MR. WEBBER: Yes, Your Honor.

11 JUDGE SIPPEL: All right. Let me ask Mr. Pettit
12 and the Time Warner -- I'm sorry, the Liberty side of the
13 table to make your presentation.

14 MR. PETTIT: I will be brief, Your Honor, because
15 I know you have questions and we're anxious to get to them,
16 as well. And now having blessed in some sense the 308
17 investigation, I guess I'm going to try to tell you why
18 one's not necessary and why you should go ahead and deny the
19 motion.

20 You know, I was reminded listening to Mr. Beckner
21 about the not seeing the forest for the trees. I mean, he
22 does tend to focus on a couple of trees here. But there's a
23 substantial forest of documentary evidence. And not just
24 documentary evidence. And this is perhaps where I part a
25 little away from the Bureau. But the declaration

1 Bartholdi's presence filed under penalty of perjury,
2 declarations from Freedom executives, as well -- or a
3 Freedom executive all of which shows that Bartholdi is --
4 the principals of Bartholdi are in control of Bartholdi, and
5 that the Freedom -- company Freedom is not in control of
6 Bartholdi.

7 And we think that those facts go mostly to du jour
8 control and to de facto control. All of the documentary
9 evidence, as I think Mr. Webber went through, belies any
10 notion that Freedom is the du jure owner of Bartholdi. The
11 agreements, in fact, are quite faithful to the long
12 established Commission precedence in this area.

13 But the agreements and the declaration of Mr.
14 Price and the declaration of Mr. Rosenblum also reflect how
15 these companies operate in fact. And Time Warner which has
16 the burden of -- on this issue simply has not shown
17 otherwise. They do, Mr. Beckner, shows what is happening on
18 the street.

19 You know, Time Warner cites absolutely no
20 precedent. And it would be impressive I think to add this
21 issue. And I suspect that none is cited. Freedom has no
22 equity interest in the licensee. It has no motive to
23 conceal. Freedom got its own licenses here. Freedom has
24 not played a dominant role in the prosecution of these
25 applications, the applications that are before this Court.

1 In fact, it's played no role at all. And Bartholdi's
2 principals are not employees of Freedom in any sense of the
3 word. It is certainly true of the intermountain criteria,
4 as well, as we go through in our pleading. Your Honor, I
5 think I will leave it at that and go into your question
6 period.

7 JUDGE SIPPEL: Okay.

8 MR. PETTIT: But I would focus the Court on Mr.
9 Price's affidavit which clearly speaks to how this
10 arrangement operates in fact, not -- not just according to
11 the documents. Mr. Price avers, in fact, that it does
12 operate just as a -- as the agreement cited.

13 JUDGE SIPPEL: All right. Ms. Kiddoo, do you want
14 to add anything to that or --

15 MS. KIDDOO: Well, Your Honor, I don't think I
16 have a lot to add.

17 JUDGE SIPPEL: Okay.

18 MS. KIDDOO: I think Mr. Pettit has stated our
19 position, as well, with respect to this transaction. We do
20 come at it a little bit differently not being a party to
21 this proceeding and not having had any of the issues that
22 were designated pertain to anything that had to do with
23 Freedom New York or any of its affiliates. Freedom New York
24 had no dealings with Liberty Cable prior to negotiating this
25 transaction which was consummated in early March.

1 The fact of the matter is that anything that is at
2 issue here with specifically liability for anything that is
3 at issue here was specifically retained by Bartholdi Cable
4 and Freedom was indemnified in the contracts. There is
5 nothing that the outcome of this proceeding would have an
6 impact on other than what Mr. Beckner tries to argue is a
7 problem and a question which is the situation of the
8 equipment. Mr. Beckner talks about the fact that he
9 believes that the equipment is already owned by Freedom.
10 That's not the case. The equipment is owned by Bartholdi.

11 But even if it were owned by Freedom, that's not
12 inconsistent with the Commission's rules and I didn't hear
13 any cases cited that say that it would be. The fact of the
14 matter is that Bartholdi has control of that equipment so
15 long as the equipment is used to provide transmission
16 services by Bartholdi pursuant to its licenses from the FCC.

17 He also talked about -- the other fact that Mr.
18 Beckner talked about that raised his questions was the
19 notion that somehow what Bartholdi did was try to insulate
20 certain portions of it's business from this proceeding.
21 Well, first of all, I'm not sure that Bartholdi's
22 programming interests had anything to do with any of the
23 issues designated in this proceeding. My understanding of
24 this proceeding is that it has to do with licenses held by
25 Bartholdi and the services that they provide -- the

1 microwave services.

2 But beyond that, the consequences really haven't
3 shifted. I mean, the only thing that's shifted I suppose is
4 the risk here. To the extent that -- and I think it's a
5 very far fetched notion -- but to the extent to which the
6 licenses that are providing transmission services are
7 jeopardized by this proceeding, the fact is they're
8 jeopardized. And to the extent that that's the case, then
9 Freedom would have to make other arrangements other than
10 transmission services to provide a service to its customers.
11 So it doesn't really seem to insulate a whole lot from this
12 Commission's proceeding to say that the subscribers were
13 transferred to Freedom.

14 JUDGE SIPPEL: I'm not sure that I follow that all
15 the way. You're saying that -- that it's -- you're saying
16 that the service contracts with the customers are in
17 jeopardy to a point by virtue of the fact that there is this
18 proceeding going on.

19 MS. KIDDOO: Well, Mr. Beckner, if I understood
20 his point, was saying that somehow what Bartholdi was
21 attempting to do by selling it's subscriber assets to
22 Freedom will somehow insulate portions of its business from
23 this proceeding. It did not transfer the licenses. The
24 licenses are still being used by Bartholdi and controlled by
25 Bartholdi to provide private carrier transmission services.